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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ADELE SIESEL HAYES, Plaintiff and Appellant, v. CLS LANDSCAPE MANAGEMENT, INC., Defendant and Respondent.	B204821 (Los Angeles County Super. Ct. No. LC069978)

APPEAL from a judgment of the Superior Court of Los Angeles County, James A. Kaddo, Judge. Affirmed.

Law Offices of Eric Bryan Seuthe & Associates and Eric Bryan Seuthe for Plaintiff and Appellant.

Horvitz & Levy, David M. Axelrad, Michael Bacchus; Law Offices of Patrick J. McDonough and Patrick J. McDonough for Defendant and Respondent.

Adele Siesel Hayes appeals from a judgment against her in this personal injury action against CLS Landscape Management, Inc. She claims the trial court failed to fashion an adequate sanction when CLS violated its pre-trial agreement to produce one of its employees as a witness at trial. She also claims there was insufficient evidence to support the defense verdict. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Appellant lived in a multi-unit condominium complex in Agoura Hills known as Annandale II. At approximately 7:00 a.m. on Tuesday, September 28, 2004, appellant took her six-month-old cocker spaniel out for a walk. She observed someone she did not know in the area where she usually walked the dog, so she decided to take a different route. Walking down an exterior staircase, she fell on the landing at the bottom of the steps, fracturing her ankle. There was wet mud on the landing where she fell.

Appellant brought this negligence action against Lordon Management Co., Annandale II Homeowners Association, and respondent CLS Landscaping Management, Inc. (CLS), which provided landscape services for the complex, including irrigation system repairs. She alleged that the mud on the steps and the failure to provide a handrail were dangerous conditions which caused her injuries. The homeowners association and management company settled with appellant, leaving only CLS in the action.

During discovery, appellant deposed Ernesto Vega, a CLS branch manager with responsibility for the weekly maintenance work at Annandale II. At the conclusion of the deposition, appellant's counsel asked for Mr. Vega's home telephone number. Respondent's counsel indicated that was not necessary: "If you need to get hold of him, you can get hold of him through me." Appellant's counsel replied, "I have no problems with not going further with questioning. However, I need your stipulation that you will produce this man for trial or pursuant to a demand for appearance, regardless whether or not he is an employee." Respondent's counsel stipulated to that, and the deposition concluded.

As trial was about to begin, respondent's counsel advised appellant that Vega was

no longer employed by respondent and that respondent would not be producing him for trial. Appellant moved to strike respondent's answer as a sanction for failure to produce this key witness. In the alternative, appellant asked the court to grant issue sanctions by advising the trier of fact of respondent's refusal to produce a key witness at trial.

The court found it would be too punitive to strike the answer, but granted the alternative relief. Vega's deposition testimony was read at trial, and the court instructed the jury that CLS had failed to produce Vega for trial, that it had an obligation to do so, and for that reason, Vega's testimony at trial was read from his deposition.

The jury found respondent was not negligent, and the court entered judgment against appellant. This is a timely appeal from the judgment.

DISCUSSION

I

Appellant claims the court erred in failing to fashion a suitable remedy for respondent's violation of its stipulation to produce Vega as a witness. We disagree.

Although respondent's stipulation to produce Vega as a witness at trial was entered into during the course of discovery, its failure to comply with the stipulation was not actually a discovery violation. That does not matter, since a trial court has authority to impose sanctions for misconduct, whether it involves a discovery violation or general litigation misconduct. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1101-1102; *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 758 (*Slesinger*).) In either situation, "[t]he essential requirement is to calibrate the sanction to the wrong." (*Slesinger, supra*, 155 Cal.App.4th at p. 763; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545 [discovery sanctions should be appropriate to the dereliction and should not exceed what is required to protect the interests of the party denied discovery].)

In this case, respondent stipulated that it would produce Vega as a witness at trial, and then it failed to do so. Appellant asked the court to strike respondent's answer as a sanction for violation of the stipulation to produce Vega. Respondent initially argued that

appellant had not properly made a demand for Vega to appear as required under the stipulation because the demand was not properly served. The court rejected that argument, noting that even if there were a technical defect in service, appellant had been insistent and unwavering about the need to have Vega available for trial.

In light of that, respondent's counsel asked for a short continuance "to get Mr. Vega served and get him down here." He asserted the relief sought by appellant, striking respondent's answer, was too prejudicial.

Appellant's counsel replied: "No, I have alternate relief, your honor. The alternate relief is that the jury be advised that he was not produced, and I'll read from the depo at this point, and it's in my motion that alternatively, I'll read from the deposition that Mr. McDonough [respondent's counsel] agreed to produce him and he isn't here." The court concluded respondent had failed to meet its obligation to produce Vega, but "to strike the answer, the court finds that that would be punitive and improper. It goes too far. However, in view of the stipulation, the court is going to instruct the jury that Ernesto D. Vega, a necessary witness, has not been produced by the defendant, and therefore, we're going to read from his deposition." To that, appellant's counsel said, "That's fine, your honor."

The court believed respondent "intended to comply" with the stipulation, and expressly stated it was "not blaming" counsel for failing to produce Vega for trial. While respondent erred in failing to produce Vega, there is no evidence that respondent ended Vega's employment or otherwise acted willfully to avoid producing him as a witness. On this record, we conclude the court did not abuse its discretion when it granted the alternative relief that appellant sought and accepted.

II

Appellant next complains that respondent's conduct was akin to spoliation of evidence, and the court thus should have instructed in terms of CACI No. 204. That instruction provides: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."

The court refused this instruction, and instead fashioned a combined instruction from CACI Nos. 203 and 204: "You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence. Deft CLS Landscape Management has failed to produce witness Ernesto Vega for trial. Deft CLS Landscape Mgmt had an obligation to do so. For that reason Mr. Vega's testimony at trial was read from his deposition." This was an appropriate adaptation of the instructions.

In rejecting a tort remedy for spoliation of evidence, our Supreme Court noted the availability of "a number of nontort remedies that seek to punish and deter the intentional spoliation of evidence." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11.) Among these is the inference that may be drawn from a party's willful suppression of evidence (Evid. Code, § 413) and the standard California jury instruction (BAJI No. 2.03 (8th ed. 1994)) setting out this inference. After quoting the language of the instruction, the court observed: "Trial courts, of course, are not bound by the suggested language of the standard BAJI instruction and are free to adapt it to fit the circumstances of the case, including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation." (*Cedars-Sinai Medical Center v. Superior Court, supra*, 18 Cal.4th at p. 12.)

That is precisely what the trial court did in this case. As we have explained, the court believed respondent intended to comply with its obligation to produce Vega at trial, and made no finding that respondent willfully violated the stipulation. This is far from the willful suppression of evidence addressed by BAJI No. 2.03, or the intentional concealment of evidence addressed by CACI No. 204. The trial court properly adapted the instruction to clarify that it was respondent's fault, not appellant's, that Vega did not appear at trial and that his testimony thus was read from his deposition. This protected appellant from the inference that her evidence as to Vega should be mistrusted because *she* failed to call him at trial, or that she should otherwise be faulted for presenting weaker evidence as to him. At the same time, it was not unduly punitive as to respondent, whose failure to produce Vega was found not to be willful or otherwise

egregious. There was no error.

We also note that in closing argument, appellant argued that if respondent was serious about putting its best evidence forward, it "would have brought before you actual witnesses—not paid witnesses—actual witnesses who could come to court and say 'we knew about this problem. We cleaned it up. We cleaned it up the week before, or there was no problem.' They didn't bring in one actual witness who had actual knowledge of what actually occurred at this property three years ago. Stronger evidence, witnesses; weaker evidence, paid witnesses." Counsel then argued, without objection: "I'm troubled by Mr. Vega not being here. I'm troubled that he worked for the company until a month before this trial. Coincidence? Or failure to produce stronger evidence?" This argument, considered with the court's instructions, permitted the jury to infer that respondent did not produce Vega at trial because it wanted to avoid adverse trial testimony from him and instead rely on his less harmful deposition testimony, and that this deposition testimony should thus be mistrusted. There was no prejudice from the court's refusal to instruct in the language of CACI No. 204.

III

Appellant claims there was insufficient evidence to support the judgment for respondent. When a party contends there is insufficient evidence to support a jury verdict, we apply the substantial evidence standard of review. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) We view the evidence in the light most favorable to the prevailing party, giving it the benefit of all reasonable inferences and resolving all conflicts in its favor. (*Ibid.*)

It is undisputed that at the time of the accident, respondent performed its weekly maintenance at Annandale II on Mondays. Appellant's accident occurred early on a Tuesday morning. Appellant's theory at trial was that she slipped on mud that had accumulated at the bottom of the stairs, and that respondent was liable because it had failed to clean up that mud despite having a reasonable opportunity to do so. Respondent presented evidence that it had performed its usual maintenance work on Monday, and that the mud did not accumulate on the landing until after the sprinklers ran on Monday night.

Appellant argues the opinion of defense expert Glenn Asakawa was based upon unreliable information provided by respondent and thus does not constitute evidence to support the verdict. We disagree.

Mr. Asakawa is a landscape architect and certified irrigation auditor. He testified that he had reviewed the deposition testimony of Ernesto Vega, respondent's manager responsible for the maintenance work at Annandale II; Melinda Tolbert, property manager; appellant; and Arthur Floyd, appellant's expert. He had reviewed respondent's invoices and service requests for the property, and examined photographs that appellant's husband took several hours after the accident. He also had checked weather records and determined that there had not been any rain in the area of Annandale II for weeks prior to the accident. He inspected the site in September 2007.

Mr. Asakawa testified that the mud shown in the photographs appeared to still be moist, indicating it had probably reached the landing shortly before the accident, "probably the evening before." He explained, "Had it been there for any greater time period, the water would have evaporated out of the mud and it would have been dry, and especially because—and again, there's no precipitation."

Defense counsel asked Mr. Asakawa whether he knew the custom and practice of CLS in September 2004 with regard to the sprinkler timers at that property. Appellant's counsel objected for lack of foundation. The court sustained the objection, and defense counsel proceeded to lay the foundation for Mr. Asakawa's testimony. Mr. Asakawa explained that during his site inspection, he met with a Mr. Ramos, who was a supervisor for respondent. Mr. Ramos indicated to Mr. Asakawa that he was familiar with the sprinkler pattern and timers in September 2004 at the Annandale II property. Counsel then asked Mr. Asakawa what Mr. Ramos told him "in that regard." Appellant did not object to this question, or to any other portion of Mr. Asakawa's testimony. Admission of this testimony thus cannot form the basis for reversal of the judgment. (Evid. Code, § 353.)

According to Mr. Asakawa, Mr. Ramos said that "All of the sprinkler systems were controlled by irrigation system controllers. Their practice was to do their

maintenance one day a week, and that day was Monday. . . . And because they came in on Monday, they did not water the site the night before or the day before. That would have been Sunday, and the reason they don't water the site the day before is because if the lawn is wet, the blades of the lawnmowers get wet and they run their lawn mowers over it, and it clogs up the machinery. And that's general practice for not just this landscape company, but any landscape company. You never want to go in and mow a wet lawn because that stuff just clogs up your mower and you spend half your time, you know, cleaning the gunk out. So—so they did not water the night before. That would have been Sunday night. They may not have even watered Saturday night. It just depends on the timing. And they—again, the maintenance company wants the lawn mower blades to be dry when they come in. So those are the two most important factors as far as I was concerned in regards to timing. And they didn't go off on Sunday. It would have also meant that they would have, in all probability, then, gone off on Monday night after they had left the property, because, you know, it was at least 24 hours before—at least 24 hours of being dry, no irrigation, right, and then the water has to come on, then, Monday or soon after or the lawns are going to start to droop, go into water stress because lawns have to be watered every two to three days. . . . You always want to try to water at night because it's a lot more efficient and a lot less intrusive, so the water comes on and it's off through the weekend, it's off Monday, and then the water would have come on on its regularly scheduled Monday night, and then—and then again two or three days after that."

Asked what he thought the possible causes were for the mud arriving on the stairway, Mr. Asakawa replied that he had ruled out natural precipitation, and there did not appear to be any nearby patios, so he had ruled out a hand-held hose, "so then that leaves the irrigation system, which is logical, I guess." He did not see enough mud in the photographs taken by appellant's husband to indicate a broken pipe or broken sprinkler head. "So then that leaves the—a normal irrigation sequence . . . ." Mr. Asakawa testified it was not uncommon for a sprinkler head to become obstructed, and described various ways this could occur. He noted there was mud on the landing, "but there's such

a little quantity that it—again, it probably happened that night during that irrigation event. There was no time for anyone to have done an inspection and actually seen it. And in actuality, as far as CLS is concerned, it happened the night after they left the project, and they weren't due back on the project until the next Monday, so there was no way for them to have noticed that there was a problem."

Mr. Asakawa's opinions about the watering schedule, the possible cause of the mud on the stairs, and the likely time when it was deposited, were based not only on information provided by respondent, but also on his own knowledge of general landscaping practice and his own observations. This evidence supports the conclusion that the mud on the stairs was not caused by respondent's failure to properly clean up the day before the accident. The fact that there was other contrary evidence does not undermine the conclusion that substantial evidence supports the verdict.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.